Unabomber

SACRAMENTO, CALIFORNIA
WENDESDAY, JANUARY 7, 1998, 4:00 P.M.
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(An ex parte and in camera discussion, consisting of pages 3615-3644, was held and reported under seal by order of the Court.)

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THE CLERK: Calling Criminal case S-96-259, United States vs. Theodore Kaczynski.

THE COURT: Please state your appearances for the record.

MR. CLEARY: Robert Cleary, Steve Lapham, and Stephen Freccero for the government, your Honor.

MR. DENVIR: Good afternoon, your Honor. Quin Denvir, Judy Clarke, and Gary Sowards for Mr. Kaczynski, who is present in court.

THE COURT: Thank you. I met ex parte in a closed proceeding with Mr. Kaczynski, his trial attorneys, and attorney Kevin Clymo from approximately 1:30 this afternoon until 3:00 o'clock p.m. today.

Just after it was decided that Mr. Kaczynski was willing to go forward with present counsel and the trial would begin tomorrow at 8:00 o'clock a.m. and that I no longer needed the services of Kevin Clymo, an attorney I appointed under the rationale of two Ninth Circuit decisions to serve as conflict attorney, should such service be necessary, I received the following fax:

"Re: Ted Kaczynski.

Dear Mr. Clymo:

Would you kindly forthwith inform Mr. Kaczynski that if he is successful in recusing his present attorneys, I am willing and stand ready to substitute in on his behalf pro bono as per my previous letter to him.

What I seek to avoid is the appearance that I am interfering in the relationship between him and his present counsel. Therefore, I do not desire to participate in the present hearings. I wish him well whatever way it goes.

Thank you for communicating the above to Mr. Kaczynski.

Sincerely, Tony Serra."

He's an attorney in the Bay Area. I'm directing that the fax I just read into the record be filed since Mr. Kaczynski indicated a desire to talk to Mr. Serra about representation.

I advised the government to be prepared to cover the issue at this hearing. I think that issue should be covered first. Maybe I should begin with the defense side of the table to see what the status is.

THE DEFENDANT: Your Honor, a short while ago I had a telephone conversation with Mr. Serra, and based on what I heard in that conversation and based on the fact that Mr. Serra has agreed not to present a mental health defense, I
think I would like to be represented by him.

As to the question of when he would be able to start, he stated that, of course, he will not be able to start trial tomorrow. He would need a considerable time to prepare. He said that he would be able to speak to me Tuesday, and on Wednesday he would be able to give the Court a more definite estimate as to when he can start trial.

THE COURT: Any further comment from the defense side of the courtroom?

MS. CLARKE: No, your Honor.

THE COURT: Government.

MR. LAPHAM: Your Honor, in the telephone conversation I

had with the Court in which you advised me that this issue would be placed on the calendar this afternoon, you indicated to me that after conducting an hour and a half of ex parte hearings this afternoon, you had resolved the issue and that the defendant had agreed to go forward with his current counsel. In our mind, if I understood that correctly, that resolves the matter.

THE COURT: That's not what I told you. I told you the same thing I just told everybody in this courtroom. The same information I just told every person that's present is what I told you during that conversation because I had a note of it.

MR. LAPHAM: Your, Honor my --

THE COURT: Just trust me that you're wrong and that the status is as I stated it during this proceeding. That's the status. No sense in arguing about something you're not going to prevail on. That's the status.

MR. LAPHAM: It appears I have my facts wrong. I thought the matter had been resolved prior to your getting the fax.

THE COURT: Let's not go over things that are not reality in this courtroom now.

MR. LAPHAM: Very well.

THE COURT: Let's deal with what the situation is.

MR. LAPHAM: I will, your Honor. Your Honor, we still don't know the contours of the conflict that the defendant raised with his current counsel and how that was resolved. I think that's important to analyzing the current issue.

THE COURT: You are correct. I would resolve that matter against the motion. That matter does not favor granting the motion. That matter was decided in an ex parte in camera proceeding and it does not favor granting the motion. The question is timeliness.

MR. LAPHAM: Well, there's another thing then. Mr. Serra's letter states it's predicated on the assumption that counsel are going to be recused from this case. That predicate has not come to pass. So I assume that Mr. Serra -- Mr. Serra indicates in his letter that he doesn't want to interfere with the existing relationship.

Your Honor, I'd also ask the Court if you're going to give us any more details about the nature of the conflict and how it was resolved? I think it's directly relevant to the government's response with respect to this issue.

The defendant has just indicated that the reason he wants Mr. Serra to represent him is that Mr. Serra has indicated that he will abide by the defendant's wishes in regard to his not wanting to present a mental defense. I assume that was the nature of the conflict he had or has with current counsel.

The government's position, as I think we've expressed to you in our brief and in prior communications with the Court, is that the defendant has a right to direct the course of his defense and that he should be advised of that right. There should be enough in the record to indicate that the defendant understands that right and that whatever conflict he had with his current counsel has been resolved with that full knowledge.

In other words, either the defendant has agreed to abide by the defense strategy proposed by his defense attorneys or the defense attorneys have agreed to abide by their client's wishes. And until we get an understanding of whether those questions were asked, I don't think the government can intelligently address the conflict question.

THE COURT: I think counsel for the defense controls the mental status defense.

MR. LAPHAM: Your Honor, we've cited you three cases that would indicate to the contrary. The American -- the Model Code of Professional Responsibility has ethical considerations which seem to be directly on point in that regard. Faretta would seem to give that right to the defendant and not to the defense attorneys. It's his life, not theirs, that's on the line.

THE COURT: Isn't his life arguably more on the line if he doesn't have that defense?

MR. LAPHAM: Well, that's something that we can't assess.

THE COURT: Well, I understand there's a lot of authority on the issue. I don't believe all cases are

consistent in deciding the issue, and I have decided as I've stated.
MR. LAPHAM: Your Honor, obviously we're speculating on what occurred in the ex parte hearings. The government's concern is that the record is protected and that the defendant has at least been advised of the rights that he has and that whatever waivers --
THE COURT: That's in the abstract at this moment. Rights that he has in what regard?
MR. LAPHAM: Well, as I just said, in regard to his right to dictate his own defense --
THE COURT: I disagree with you so far. That's my ruling.
MR. LAPHAM: So the defendant has been advised that he has that right?
THE COURT: Why would I advise him that he has the right if I just stated that the defense is controlled by his counsel?
MR. LAPHAM: I think that answers the question then.
Your Honor, may I have a moment?
THE COURT: Yes.
MR. LAPHAM: Your Honor, the only thing I would add is that on the timeliness question, Mr. Serra's entry into the case would be well beyond what most of the cases have deemed to be timely. It apparently will require a continuance of the trial date, as the defendant has just indicated. And not just a continuance, but a substantial continuance.
These defense attorneys have been in on this case for 18 months. It's a very complex case involving many documents, quite a lot of physical evidence, and simply fact situations that are not easily comprehended in a short period of time.
There's no basis in permitting the defendant at this point to interrupt all the preparations that have been made to this point simply because of a choice -- a different choice in attorneys. So we think it would be inappropriate to bring Mr. Serra into the case at this point.
THE COURT: The Ninth Circuit states in United States vs. Walker, 915 F.2d 480 at 482 that it is within the trial judge's discretion to deny a motion to substitute made during or on the eve of trial if the substitution would require a continuance.
However, the Walker decision requires focus on when the request for new counsel was first made. In walker, the court found significant that Walker requested the counsel in a letter dated one week before the trial began. Here the request was made on the morning of trial, January 5, 1998.
Because of the nature of the request, it had to be evaluated to determine whether Mr. Serra's offer to perform pro bono services was still outstanding. When his office was contacted, an attorney from that office informed my secretary that Mr. Serra was out of town and the office was not sure when he would return, possibly sometime that day, the next day or the day after.
That lawyer also informed my secretary that she knew that he was interested in the case but had a conflict with the Federal Defender's Office and unequivocally withdrew his offer to represent Mr. Kaczynski because of the conflict.
That means that the offer was renewed today right around **3**:00 o'clock p.m. I agree with the government. I think the offer is untimely. We are already prepared to proceed with trial. We have already selected a jury. The jury is scheduled to appear at 8:00 a.m. in the morning. The government has already subpoenaed witnesses.
For those reasons, it is untimely. And since none of the factors favor granting the motion, the motion is denied.
My notes indicate that we have at least four matters to cover. The government has filed an in limine motion addressing two issues. One issue is the mental status defense. The other issue is a hearsay objection.
The government also mentioned at a previous hearing a desire to have the Court rule on certain statements that it plans on using in its opening statement. We have to cover

two
jury instructions proffered by the government. I'm going to cover two of the issues now, in limine issues. I don't think it would be helpful to receive argument, so I'm going to rule.

The parties dispute whether mental status evidence is admissible through lay witnesses at the guilt phase of the trial and appear to focus on different things. The government
appears to focus on the applicable legal standard, while the defense is focused on the factual showing it believes it is entitled to make.

The government relies on the Third Circuit decision in Pohlot, 827 F.2d 889 (1987), and the Eleventh Circuit decision
in Cameron, 907 F.2d 1051 (1990) -- actually, I think that's a
1987 decision also -- for the proposition that Kaczynski proffers evidence which is irrelevant to prove that he actually lacked the requisite mens rea to be guilty of the indicted offenses.

The Third Circuit states in Pohlot, "In light of the strong danger of misuse of such defenses, district courts should examine proffered psychiatric testimony to determine whether any evidence of mental abnormality negates mens rea," at 905.

Kaczynski counters the government's motion arguing that the Court should reject the government's broad-based request for the wholesale exclusion of evidence in light of the Sixth Amendment right to present a defense, something that is an essential attribute of the adversary system.

Kaczynski further argues that circumstantial evidence even presented by lay witnesses could be probative evidence of
a defendant's intent. The government did not pointedly rely on the Ninth Circuit decision in United States vs. Twine, 853 Fed.2d 676 (1988) as support for its motion.

It did reference its trial brief in which Twine was cited, but there was no analysis of Twine in connection with the present motion, nor was Twine cited in the opposition to the motion.

Since the government's motion clearly relies on the legal standard stated by out-of-circuit authority rather than the standard of the Ninth Circuit, the issue presented is whether the legal standards are the same. Since the government failed to show that the standard used in the Third and Eleventh Circuits are the same as that applied in the Ninth Circuit, the motion is denied.

See State vs. Mott, 931 P.2d 1046 at 1052, a 1997 Supreme Court decision of the state of Arizona which seems to suggest that the standards may be different.

Further, the government's motion to exclude statements it characterizes are hearsay is denied since the defendant counters that the statements are not being offered to prove the truth of the matter asserted therein. Therefore, those motions are denied.

We need to now turn to the prior statement issue. What are the statements?

MR. DENVIR: Your Honor, I wonder if these statements should be detailed to the Court and argued at the sidebar. If
the Court rules them admissible, then we can do that in open court. If it orders them inadmissible, it can remain closed because we do not want to take a chance at tainting the jury before it has been sworn. I think there's only four statements.

Mr. Cleary, is that correct?

MR. CLEARY: Four or five, correct.

MR. DENVIR: It's a short number. I think the we could argue them quickly. We would be concerned that something that
would be ruled inadmissible would be reported by the considerable press.

MR. CLEARY: I have the written statements here. I can hand them up to the Court with a copy for counsel, if that's the way you want to proceed.

THE COURT: I'm wondering whether there's a need to argue the statements at sidebar. This is what I'm wondering. Is it feasible to show me the statements at sidebar, and then you argue your respective positions in open court? Is that

feasible?
MR. DENVIR: We can try it.
MR. CLEARY: Fine with the government.
THE COURT: Let's try that.
Are you going to read the statements into the record or just show them to me?
MR. CLEARY: Whatever you prefer, your Honor.
THE COURT: I think you should just show them to me, because if they are not admitted, we'll read them into the record then.
(Off the record discussion at sidebar).
THE COURT: We just decided that I will only look at one statement at a time. That way I am clear as to what statement
is involved in the argument.
MR. CLEARY: May I proceed, your Honor?
THE COURT: Yes.
MR. CLEARY: Your Honor, what we just showed the Court was a statement that can only be characterized as a direct admission to Count 1 in the indictment. And for the life of me, I cannot fathom how a direct statement written by the defendant, a direct admission to a crime he's alleged to have committed, how that could be ruled inadmissible.
The defense has never articulated any basis for how a direct admission, clearly relevant and clearly admissible, clearly nonhearsay under Rule 801, should be ruled inadmissible.
So we would like to offer that evidence. We think it is admissible. And the government would like to open on that statement, because it does relate to a charged offense.
Thank you.
MR. DENVIR: Your Honor, our position is, obviously, we're objecting under Section 403, and we're also objecting under the Eighth Amendment because we feel that any of this evidence that's presented in the guilt phase will be also presented in the penalty phase.
Our position is that what the Court has to do under Rule 403, as you're well aware, is to weigh the marginal probative value of this particular statement when assessing against all the evidence. And the government is asking for this advance ruling in order to use this particular statement in its opening statement, against the prejudicial effect of it.
And we believe that when the Court sees this entire case and sees the physical evidence, the other writings, direct admissions in certain areas, that this particular item here, the Court will find that it's of marginal probative value. A statement made after the fact. Is substantially outweighed by
the prejudicial effect of it.
And I realize it's very hard to argue this to the Court. This is exactly why we urged the Court to have the government either open at its peril without a ruling or delete
this particular matter, which it's hard to believe is critical
to their opening statement, this one particular statement, and
wait until you're at trial when you're presented this matter after you've seen the rest of the evidence. Because, again, it is this question of marginal probative value on an intent issue as to which there will be substantial other evidence presented, both in the form of other evidence as to the chart,
other statements as to this particular event, as to other charged events, and as to other not charged events, we believe.
I know it's hard for the Court to be in the position to make that weighing. That's why we think it shouldn't be made. But we think that this ultimately will be held inadmissible, and therefore we object to it being used in the opening statement, going to the jury, and then it be kept out.
THE COURT: What did you mean with that part of your argument when you indicated the government should open at its peril without ruling?
MR. DENVIR: Well, your Honor, generally in opening statements, the parties would make their opening statement, and they take their chances on mentioning things that will not
ultimately be put into evidence. And we feel if the

government can tailor their opening statement, we've heard enough from their opening statement --
THE COURT: I'm still not with you. I thought the government is raising this matter at this point because the government believes that if it seeks to use this statement, it's going to meet an objection, and that it saves time to deal with it now rather than have the jury wait in another room while we deal with it during the trial.
MR. DENVIR: At the time that it would be admitted into evidence, your Honor, we believe that the Court will be in a better position to make the 403 analysis and the Eighth Amendment analysis.
THE COURT: If we were talking about uncharged act evidence, I could see your point. I am not persuaded by your argument insofar as charged evidence is concerned. I do not see this as violating the Eighth Amendment, nor do I conduct the balance under 403 the way you would like me to. I do not believe that it should be excluded under 403.
MR. DENVIR: Very well, your Honor.
MR. CLEARY: Your Honor, maybe we can move through the other statements. Let me try characterizing them in somewhat of a veiled way and see if we can get a ruling that way.
The second statement that I would offer is of the same kind, not as descriptive, not as detailed as the one I just showed you, and it relates to the bombs that injured Dr. Epstein, which is Counts 2, 3 and 4 of the indictment, and
the bomb which injured Dr. Gelernter, which is Counts 5, 6 and
7 of the indictment, and we would offer that for the same reason.
Again, no objection has ever been posed by the defendant, and I don't think that simply stating 403 is stating an objection with sufficient specificity.
MR. DENVIR: Your Honor, our objection is under 403. The marginal probative value is outweighed by the prejudicial effect, and also under the Eighth Amendment. And we would submit it in light of the Court's previous rulings.
THE COURT: Okay. The objection is overruled.
MR. CLEARY: Finally, Judge, again trying to do this quickly, there is another statement that relates to the final three counts of the indictment. It is of the same ilk and character as the first statement, the one the Court read that does relate to the bomb that killed Gill Murray, and we would offer that also.
MR. DENVIR: Your Honor, we have the same objection. And we would submit it in light of the Court's previous ruling.
THE COURT: Okay. It's overruled.
MR. CLEARY: Finally, your Honor, the government will offer at trial and would like to open on a statement that is a
statement of intent that doesn't go directly to any specific charged event but we believe shows the intent of the defendant
to commit a whole series of events that are charged.
Let me see if I can explain this, again trying to be a little veiled about what I'm saying.
THE COURT: I think I want to see this.
MR. CLEARY: Why don't I do that, your Honor.
(Off-the-record discussion at sidebar.)
THE COURT: This needs to be covered on the record, everything that just happened at sidebar.
MR. CLEARY: Your Honor, we just showed the Court a statement written by the defendant in approximately 1972 referring to his state of mind in 1971. It's a statement that
when I previewed my opening statement to the defense, they objected to it. I believe that was last week. And I believe we put on the order that they had an objection. I believe counsel just said at sidebar that they are withdrawing that objection. They no longer object to me using that statement in my opening statement.
MR. DENVIR: That's correct, your Honor.
THE COURT: The record should reflect that I said nothing at sidebar that prompted the withdrawal. I didn't say
anything. I'm just trying to look at the statement.
MR. DENVIR: Sua sponte.

MS. CLARKE: We can't blame you.
THE COURT: All right. That covers all the statements?
MR. CLEARY: That does, your Honor. Thank you.
THE COURT: How about the jury instructions? The government has proffered two jury instructions.
Has the defense had an opportunity to look at them?
MR. DENVIR: We have, your Honor.
THE COURT: What's your position?
MR. DENVIR: As to the instructions on other crimes, we have, I think, three positions. One is we believe that part of it is legally improper. Secondly, we are not requesting any instructions in that regard. We see no need for that type of instruction to be given as part of the preliminary instructions singling out one type of evidence.
THE COURT: It's a 404(b) instruction.
MR. DENVIR: It's Ninth Circuit 4.4.
MR. CLEARY: We would have no problem if the Court chose not to give that. We were only offering it because I believe the Court asked for some guidance from the parties on that.
THE COURT: I won't give it over an objection from the defense.
How about the other instructions?
MR. DENVIR: Again, your Honor, this is an instruction for which the government provides no particular authority. We do not think it's a proper instruction to be given as part of the preliminary instructions. We would oppose it being given at that point. If that type of evidence is introduced, if the Court feels it's a proper instruction, it could be given during trial or with all the other instructions at the end of trial.
MR. CLEARY: I think it's appropriate to give it at the beginning, because I think it's going to be very easy for the jury to be confused.
As I understand what the defense is going to do, they're going to try to put on a mental defect defense in the very opening statement. I think this is a sufficiently complex area, as the Court's well aware given all the briefs we have filed on it. I think it's very important that the jury understands right from the get-go the limited use for which that evidence can be used.
This is not an insanity defense, number one. Number two, that issue is not relevant at all to the 924(c) count in the indictment. And that's all spelled out clearly, I think, in the instruction.
Also, it's important, I think, that the jury knows that this is not an issue of sympathy, that they cannot be using this to generate sympathy for the defendant. And I think the instruction, again, is at least designed to convey that message to the jury.
THE COURT: I'm not going to give the instruction over the objection of the defense. I think that the instructions at the end of the trial will apprise the jury of the issues, and I'm not concerned about the jury being confused. I doubt that they will be confused after hearing all the instructions and the arguments of counsel.
Is there anything further to cover? I think we just covered everything?
MR. DENVIR: We have nothing further, your Honor.
MR. CLEARY: A couple of housekeeping matters, your Honor.
The parties have discussed informally not requesting the Court to impose an exclusion of the witness rule under Rule 615. Obviously, the Court can impose one sua sponte, but we'd like some guidance from the Court as to whether you're going to do that, because we do have some people in the courtroom and we will have some in the courtroom tomorrow in the absence of a 615 order.
THE COURT: I'm not going to do it sua sponte.
MR. CLEARY: Another issue is the parties have entered into a series of stipulations. I don't have the number written down, 15, 20 different stipulations which will substantially shorten the trial. It is our understanding, as set forth in our trial brief, that the defendant himself personally must affirm that he knowingly and voluntarily

entered into those stipulations.
What I would propose to do at this point is tell your Honor what those stipulations are generically, and if the Court could just ask the defendant personally if he knowingly and voluntarily entered into those stipulations.
Is that acceptable?
THE COURT: If it's okay with the defense.
MR. DENVIR: Your Honor, I think we'd like to deal with that first thing in the morning. We do not have a full copy of those. We want to provide them to Mr. Kaczynski. I don't think there's any problem with it. Since they wanted him to be aware of their contents, that's a different matter.
MR. CLEARY: I have no objection to that, your Honor. We have some other rather mundane issues. We have a court copy of the various exhibits, the photographic exhibits we're proposing to offer tomorrow. I just want to know from the Court if you want us to hand those up now to you, it will save
time tomorrow, or if you want we can hand them up one by one as we're offering them.
THE COURT: I'll take them now.
MR. CLEARY: Also, your Honor, a folder of the Jencks Act statements for the entire trial, which I'll hand to your clerk now.
Your Honor, in your Jencks Act statements, what we have not included, just because of the shear volume of them, is the
Jencks Act statements of the various laboratory examiners. And when we get to that part of the case, we can talk to the Court to see if you want copies of those at that time.
THE COURT: What is this?
MR. CLEARY: Those are the photographs we're proposing to offer tomorrow relating to the bomb that killed Mr. Scrutton.
MR. DENVIR: And we would object to those, your Honor.
THE COURT: You're going to have objections that will have to be ruled on during opening statement?
MR. DENVIR: Not during opening statement.
THE COURT: Okay.
MR. DENVIR: No, your Honor, at sometime during the trial itself.
MR. CLEARY: Your Honor, I would suggest let's handle that now. We produced those marked exhibits about three weeks
ago to the defense, so everyone should be well on notice what those objections are. Maybe we can get through the rest of the housekeeping matters and we can resolve that issue now.
THE COURT: We're not really here to decide that type of an issue, although I have an issue I want to talk to the parties about.
MR. CLEARY: Okay. A couple of other matters, your Honor. I'm going to be using two charts in my opening statement. I cleared this with defense counsel. They have no
objection. I'll be putting them up in the middle of the well. I'm not sure the Court will be able to see them. Do you want a small mock-up of those charts?
THE COURT: If that's feasible. If it's not feasible, don't worry about it.
MR. CLEARY: I have them right here, your Honor. They're entitled "Unabomb Bombs" and "Government Exhibits Numbering System." On the government's exhibits numbering system chart, there are a couple of lines that I've deleted in
the actual chart, but otherwise what you get is going to be actually on the chart.
THE COURT: Okay.
MR. CLEARY: The last matter, your Honor, is the Court asked me a week or so ago how long we anticipated the government's opening was going to be. We guesstimated at that
point it going about an hour. If it's acceptable to the Court, the government's opening may go a little bit longer than that, probably closer to an hour and 15, hour and 20 minutes.
THE COURT: Okay.
MR. CLEARY: Thank you.
THE COURT: I wanted to revisit just a general discussion of a 404(b) question. I'm not certain that I had

one of the defense's briefs on that matter when I did my initial analysis.

The defense filed a reply to the government's reply. That's not typical. Typically, what the defense files is an opposition, so you don't look for a reply to the government's reply. So when I did my analysis, I don't recall seeing that document.

That document seems to set forth a different legal conclusion than the opposition filed by the defense.

What is the defense's position on the 404(b) issues?

MR. DENVIR: Your Honor, I don't have those documents in front of me.

THE COURT: Let me tell you what I remember. I remember the defense stating in its opposition -- I think I remember this -- that the Court could preliminarily grant the government's 4 -- I'm thinking about 403, but you indicated that I could grant the 404(b) and I could preliminarily grant the 403 aspect of the motion. But then in your reply, the defense seemed to vigorously dispute the 403 issue.

MR. DENVIR: Let me tell you where I think it is. I think it has been overtaken by this series of stipulations that are going to be introduced. I think this is a fair statement. We have entered into stipulations with the government as to the basic facts of the uncharged crimes, as to what physical evidence will be introduced regarding them, as to what photographs will be introduced regarding them, and maybe as to certain other ones, one or two other matters. As to those, we have no 404(b) objection nor a 403 objection.

Those are the stipulations that we're going to show Mr. Kaczynski and expect to enter into tomorrow. We have an agreement as to how they will be used which we'll submit to the Court.

The only thing that is remaining as to the 404(b) as to which we have an objection is as to particular statements of Mr. Kaczynski that allegedly relate to those uncharged crimes. And as to those, we are not objecting on a 404(b) basis, but we are objecting under 403. We don't know how the government is planning to present their case, when the uncharged crimes evidence and stipulations will be introduced or will attempt to introduce those statements, but we believe the Court can rule on those on a straight 403 basis based on the evidence.

THE COURT: I see. That clears it up.

MR. DENVIR: I think those briefs had both been filed before we had -- we had proposed the stipulation, we hadn't worked it all out, and now I think we have an agreement which we expect to finalize tomorrow.

THE COURT: Now, you just indicated that the stipulation embraces 404(b) evidence, and it covers not only 404(b) but 403.

MR. DENVIR: We have no objection to what's stated in the stipulation on any basis. We are stipulating to that without any objection. We only have 403 objections as to particular statements. I think that's a fair statement.

MR. CLEARY: The only disagreement we have, your Honor, is there is a major 404(b) issue on the Court's plate still. And that is the government's supplemental brief on 404(b) which relates to the nonbombing acts of violence by the defendant. We submitted that brief after the defense gave a mental defect notice, and we told the Court at that point that
we would be offering the nonbombing acts of violence evidence only in response to or only if the defense raises a mental defect defense. That issue has never been resolved.

THE COURT: Let me tell you why. And that's one reason I'm discussing it, because I'm not sure that the government understands my view of 403. I recall argument on the 404(b) issue earlier during the proceedings. I think around April or
May. I recall one of the government's lawyers telling me that
I should rule at that time. And I indicated in response that if I am enabled to rule, then I rule. If I am not enabled to rule, I don't rule.

At the last hearing we had, the government again was asking for a ruling and I, in essence, indicated to the government that I thought I would be ruling in an evidentiary vacuum. The government suggested that that vacuum would be eliminated if I analyzed the trial brief. And, frankly, the first time I looked at the trial brief, I looked at it with

evidentiary issues in mind. I didn't look at it with facts in
mind. Well, I did return to the trial brief and looked at it
with facts in mind, and I disagree with the government.
Typically, when I issue a pretrial 404(b) ruling, the
government makes a proffer sufficient for the Court to
understand the evidentiary issues, the facts, and the proffer
typically explains to the Court why the government needs
particular evidence. It may even point out an anticipated
defense that indicates why the government needs the evidence.
By looking at both the trial brief and the 404(b) brief,
I cannot assess the strength of the government's case. And
so
in my opinion, the Court would be ruling in a vacuum.
I think you should look at Old Chief, the United States
Supreme Court in Old Chief. That decision indicates that
trial judges have used two approaches in handling 404(b).
One
they called an island approach, which is an approach I think
the government wants me to use. And the other is an approach
that involves analyzing the evidence, making a determination
as to whether there is available proof on the proposition
already in evidence, and then determining whether the
uncharged act is probative on that proposition.
Without the Court knowing what evidence the government
has on a particular proposition, how can the Court possibly
evaluate the probative value of a particular piece of
uncharged conduct? You would be speculating. And I'm not
going to speculate.
MR. CLEARY: Your Honor, I wasn't suggesting that you
should. I was just pointing out that there is that issue
still on the Court's plate, because it had been removed,
quite
frankly.
THE COURT: I'm telling you that I'm not going to issue
rulings if I don't understand the probative value of the
evidence you're seeking to admit.
MR. CLEARY: I understand that.
THE COURT: Okay.
MR. CLEARY: I understand that. And, again, I just
wanted to make it clear -- and we'll get back to that I'm
sure
at one point and raise it, your Honor. We're not asking for
a
ruling today.
THE COURT: But you asked for it the other day.
MR. CLEARY: No. I was asking for a ruling on the main
403, not the supplemental briefs. It's only responding to
the
mental defect defense. I raise it now because today it seems
clear the defense is going to be raising a mental defect
defense, and at some point during the trial, we'll be seeking
a ruling from your Honor on that score.
THE COURT: I hope at the time you seek the ruling, the
Court is in a position to evaluate the probative value of the
evidence you are seeking to have admitted.
MR. CLEARY: Certainly, your Honor.
THE COURT: Okay.
MR. CLEARY: Now, the other point the Court raised about
what you have at your disposal, I think the Court mentioned
the trial brief. It is my recollection that all the Court
has
is a redacted version of the trial brief; is that correct?
THE COURT: Correct.
MR. CLEARY: My recollection is that deleted from that
is a great deal of evidentiary mater which would, we believe,
be of assistance to the Court in resolving these issues.
And,
indeed, that's why we drafted it that way with a detailed
statement of facts to help the Court resolve these
evidentiary
issues not in a vacuum.
We could -- and I realize why you wanted us to file it
only in a redacted form, but the tick-off is tomorrow. The
jury will be here, you'll instruct them. What we'd like to
do
tomorrow after the jury is instructed on publicity and
avoiding publicity is file that trial brief in toto so the
Court will have that and that will assist the Court on these

evidentiary rulings.
THE COURT: The defense.
MR. DENVIR: Your Honor, the only redactions from the trial brief, there are a certain number of alleged statements by Mr. Kaczynski which we feel are highly prejudicial. They can be dealt with during the course of the trial. There's no particular reason the Court needs -- you can see what the redactions are. They're very limited from the trial brief. They're marked in there. And we see no reason to be filing this unredacted trial brief. It serves no purpose at all.
If the Court rules some of that matter inadmissible, we are still concerned. Although we will have a jury that is sworn and although we will have a jury that will be admonished, our experience in this case in talking to jurors is it's very difficult to avoid the voiceovers on TV, the headlines in the newspapers, all those types of matters.
So although the admonition may be helpful, we don't think it's a surefire insurance policy. There's no reason to be filing this unredacted trial brief with those matters in there. The Court doesn't need it now, and it doesn't have to be in the public file so that it will potentially taint the jury.
MR. CLEARY: Your Honor, I don't know why the defense has any say-so in how we litigate our case. We have a right and we have an obligation to do two things. Present our case as forcefully as we can, and also we have an obligation to the
Court to apprise the Court and to assist the Court to make the
rulings that we believe are appropriate and proper in this case.
Our failure to do the second part of that is based upon -- and your Honor just pointed to this. You are dealing with some of those issues in a vacuum. That's because we have
been very, very circumspect in what we've put into the record. But tomorrow, starting tomorrow, we should not have to be circumspect. We should be able to assist the Court, we should be able to develop a full record, and we should be able
to forcefully litigate this case in a manner that we deem appropriate.
And they, I don't believe, have any standing to say that we should not be allowed to file briefs the way we want to file them, putting facts, facts that will, in our view, be definitive of all this, putting facts before the Court. And we would like to do that. I think it would be a big help to the Court.
THE COURT: I'm not sure it would help me the way I need to be helped. The trial brief doesn't really tell the Court the evidence that the government will ultimately proffer in its case in chief. There's a number of things stated in your trial brief, but I can't figure that out. And that's because the way -- I'm not being critical of the government's trial brief. I think it's very thorough, it has been very helpful, but it's not organized in a way that allows a judge to just look in one location and then figure out all the evidence the government is going to offer in its case in chief.
If that occurred, then I wouldn't be opposed to what you're indicating. But I don't think I'm going to be in any better position when you do that than I am right now because of the way its organized.
Typically, in other cases where the government has made this motion -- and perhaps I didn't advise you of this and that's why you didn't do this -- I just assumed that the United States Attorney's Office that appears in front of me would know that this is what I expect. But typically when the
government makes the motion, they tell me what their case is about as far as all the evidence is concerned and why it believes it needs other evidence, uncharged evidence. And so I can look at the government's case, and if there's no opposition, no correction by the defense, then I can see why the government needs a particular piece of evidence.
I'm just not convinced that having the redacted material is going to put me in a better position than I'm in right now. So therefore I think we're going to adjourn. I assume that we've covered everything.
MR. DENVIR: Yes, your Honor.
THE COURT: I don't want that at this point. You may be

right, and I have to worry about pretrial publicity. I think I want to talk to the jurors to see if I have to worry about -- I mean not pretrial, it will be trial publicity at this point.

MR. CLEARY: Before it gets some assurance from the jurors that it's not going to be a major issue, can we revisit the issue?

THE COURT: You can.

MR. CLEARY: I accept your ruling. I'm not arguing with your ruling. But if you look at pages, for example, 20 and 21 of the trial brief, the bottom half of 20 is blank, most of page 21 is blank. That is a quotation, that is a significant passage of evidence that the government is going to be offering in the case, and I think it would help the Court do its 403 balancing.

That is just an example of some of the redactions that were taken out of that brief. And I think, as I say, it would be helpful.

THE COURT: I won't foreclose you from raising it again.

MR. CLEARY: Thank you.

THE COURT: Thank you.

MR. DENVIR: Thank you, your Honor.

(Court adjourned at 5:00 p.m.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE GARLAND E. BURRELL, JR., JUDGE

-- oOo --

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) No. Cr. S-96-259 GEB
)
THEODORE JOHN KACZYNSKI,)
)
Defendant.)
_____)

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